No. 8[illegible]

In The

Supreme Court of the United States

October Term, 1963

Van D. Muellar and Judy Noyer,
Petitioners,

v.

Oliver R. Allen, Jr., Dennis J. Breitbaum, Karen F. Breitbaum, Thomas W. Dee, Mary J. Dee, Edward F. Fujan, Joleen A. Fujan, Brenda R. Hoffer, Richard C. Hollingsworth, Marjorie Hollingsworth, Robert DeHaan and Dorothy DeHaan,
Respondents.

Appeal from the United States Court of Appeals for the Eighth Circuit

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[illegible]

[illegible]

QUESTIONS PRESENTED

Whether the Minnesota statute subverts the holdings of this Court in Establishment Clause cases giving special status thereunder to public schools; and further, whether the effect of such a statute works detrimentally to the welfare of public schools in encouraging enrollment in church schools, leading ultimately to the financial distress of public schools and to racial and class segregation therein.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-195

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,
Respondents.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR UNITED AMERICANS FOR PUBLIC SCHOOLS

United Americans for Public Schools, pursuant to Revised Rule 36 of this Court, respectfully applies to this Court for leave to file its annexed brief as amicus curiae in support of Petitioners in the above entitled action, on the following grounds:

1. Amicus Curiae has obtained consent of the Petitioners but not of Respondents to the filing of this brief.

2. This action presents questions, including those set forth in Petitioners' Jurisdictional Statement, to which amicus refers and incorporates herein. In addition, amicus suggests the following:

> Whether the Minnesota statute subverts the holdings of this Court in Establishment Clause cases giving special status thereunder to Public Schools.
>
> Whether the effect of such a statute as here involved works detrimentally to the welfare of Public Schools in encouraging church school enrollment, leading to financial distress, racial and class segregation, in public schools.

3. Interest of United Americans for Public Schools.

United Americans for Public Schools is a California non-profit corporation, formed in 1953, and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members, and to the public, related and objective educational facts and findings to preserve the purposes of public schools and of said constitutions, and to foster adherence thereto and support thereof.

Accordingly, acting in such capacity, Movant initiated action to declare unconstitutional a California statute effective January 1, 1973 which granted tax credits to parents of children attending non-public schools. *United Americans for Public Schools* v. *Franchise Tax Board.* A federal three-judge court declared the statute unconstitutional. This Court upheld that decision on Movant's motion to affirm. 419 U.S. 890, October 21, 1974.

The position of the eighth circuit is in direct conflict with the principles of our case, and if upheld, would make naught of Movant's efforts in California. Not only is the principle of *stare decisis* involved, but failure to overturn

the eighth circuit decision would eventually open the floodgates for public aid to religiously-oriented schools in California and elsewhere, all in contravention of Movant's interests and stated objectives.

Thus Movant's members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned, both personally and economically, in the issues of the instant case, because (1) of their concern generally with preserving the purposes of public schools and the Constitutional doctrine of separation of church and state, (2) because the statute under attack, but held valid below, constitutes a thinly veiled attempt to subsidize church schools from funds that belong in the public treasury, contrary to established principles of separation of church and state and contrary to Movant's stated purposes and objectives.

4. Reason for submission of brief.

The detrimental effect upon the free American public school system of the Minnesota legislation and other like legislation has not been sufficiently explored in the decisions and briefs below.

It is respectfully requested on the above grounds that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

UNITED AMERICANS FOR
PUBLIC SCHOOLS

HENRY C. CLAUSEN
Attorney for Movant

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BRIEF FOR UNITED AMERICANS FOR PUBLIC SCHOOLS

INTEREST OF THE AMICUS CURIAE

United Americans for Public Schools is a California non-profit corporation, formed in 1953, and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members, and to the public, related and objective educational facts and findings to preserve the purposes of public schools and of said constitutions, and to foster adherence thereto and support thereof.

STATUTE INVOLVED

The statutory provisions involved in this suit appear in Petitioners' Jurisdictional Statement to which amicus refers and incorporates herein.

STATEMENT OF THE CASE

Reference is made to the foregoing motion and to Petitioners' Statement.

SUMMARY OF ARGUMENT

History records that governmental aid, both direct and, as here, indirect, to private and church schools is destructive of our *constitutionally favored public school system.* An exodus of public school students to private and church schools results; church schools are thus caused to proliferate, leading inevitably to class and racial segregation in public schools and to an increase in the financial plight of the public school system. The dramatic increase in the Minnesota tax deduction bears out the warnings of the Court in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), in which we were Amici Curiae, and which case should control here.

ARGUMENT

I. HISTORY DEMONSTRATES THAT THE ULTIMATE EFFECT OF STATUTES LIKE THAT OF MINNESOTA IS TO JEOPARDIZE SERIOUSLY OUR FREE AND CONSTITUTIONALLY FAVORED AMERICAN PUBLIC SCHOOL SYSTEM.

As Justice Brennan said in his concurring opinion in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, at page 230:

> "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."

And at page 241-242:

> "The American experiment in free public education available to all children has been guided in large

measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . The public schools are supported entirely, in most communities by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. (citing case) This is a heritage neither theistic or atheistic, but simply civic and patriotic. (citing case)."

Justice Frankfurter in *McCollum* v. *Board of Education*, 333 U.S. 203, at 212-222, reviews extensively the history of the public school system and in part the attempts over the years to secure public aid for private and church schools. At pages 216-217 he states:

"The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice."

The wisdom of these observations is demonstrated today in the bloody and savage brutalities and religious atrocities in Lebanon, Iran and Iraq, and Northern Ireland.

The history to which Justice Frankfurter alludes demonstrates that governmental aid to private and church schools in America (and elsewhere) is destructive of our public school system. The opinion documents the following:

In 1812 New York State enacted laws which set up a system of public schools. But New York City fought for the right to stay out of that system. This resulted from intensive pressures of private and church schools. The legislature yielded to these demands and as a result New York, the largest city in the state, proceeded under its own system. There then ensued bitter conflicts which raged for 30 years among more than fifteen religious denominations, private schools, church schools, voluntary associations, the schools which were substituted for the public schools. The war was bitter for a share in the division of tax funds allotted from the State treasury. Exposures showed many instances of "cut-throat" competition, enrollment padding, proselyting and duplicating of competing schools in the same neighborhood, because more numbers of students would entitle the city to additional funds.

There was constant turmoil. The Bethel Baptist Church controversy started in 1821, and ended with the Roman Catholic controversy in 1842. Logrolling in the Legislature was rampant. After 30 years of fighting and struggling a climax came in 1842 when the state legislature finally decided to establish a public school system in New York City under local control.

Overseas in Holland in the 19th century an attack was levied upon the principle of separation of church and state. Salary subsidies were enacted for church and other private school teachers. Such subsidies increased until finally legislation was passed for full public funding of

all church and private schools. This later became part of the Dutch constitution in 1917. Thereupon, religious leaders pressured their flocks to send children to their particular church schools. As a result of this campaign, the enrollment in public schools fell from 79% in 1860 to 27% as of 1978, and of the total governmental expenditures for education, the public schools received as of 1978 a dismal 19%.

See Church & State, Vol. 27 No. 10, pages 7 to 8, November 1974 (a definitive study of assistant editor Menendez, in the official organ of the United Americans). Also, Vol 6 the new Encyclopaedia Britannica, p. 380f.

The Dutch historical experiences are a continuous entanglement between church and state because there is no separation. Governmental funding of church schools from tax money—teacher's salaries, erection of buildings, maintenance, inspection—(called free schools) have escalated, step to step, until what we would call the public schools have been lost in the shuffle. This crept along until it became the norm.

The public schools were required to accept all children but the church schools could segregate along religious lines, indoctrinate their particular dogma and fix their standards of acceptance, leading to a "ghetto" mentality.

Thus, there has been slow downgrading and virtual destruction of what had been the public schools in Holland. Though 79% of primary students attended public schools in 1860, about 3 in 4, the number fell to 60% in 1900, 55% in 1920, and 27% in 1950, about one in four.

The inevitable political competitive "log rolling" for funds also short-changed the public schools so that in 1969 only 19.6% of the total educational funds went to public schools compared to 80.4% for private and church schools. As in this country, each particular church school indoctrinates its religious dogma, and this permeates all courses of the curriculum, including extremely biased views of history and culture.

This Court has recognized that tax dodges such as tax deductions or credits for parents of private and church school children lead inevitably to the dangers history poses, and to the creation of emotional divisiveness among the electorate. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). As the Court said at page 793 in striking down a New York statute granting tax credits, called in the statute a "deduction":

> "Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions."

II. EVEN THOUGH THE MINNESOTA STATUTE GRANTS A TUITION DEDUCTION TO "ALL" STATE TAXPAYERS THIS DOES NOT CURE THE SAID EVILS. FURTHERMORE, THE FACT THAT IT PROVIDES FOR A 150% OR MORE INCREASE IN THE DEDUCTION ILLUSTRATES AGAIN THE VICE OF PROVIDING INDIRECT GOVERNMENTAL AID TO PRIVATE AND CHURCH SCHOOLS, OF HOWEVER LONG-STANDING.

Respondents contend that in providing for a tuition tax deduction to all Minnesota taxpayers, the aid so provided to parents of private and church school students becomes too remote to bring the statute within the proscription of the *Nyquist* case. They contend further that since the deduction has withstood local constitutional attack for some years, it has acquired some sort of constitutional immunity. We contend the contrary.

It is obvious that in the vast majority of cases this tuition deduction can be available only to parents of private and church schools of these, the vast majority are church schools. The public schools are *free* institutions. Public schools ordinarily do not charge tuition. This ob-

vious fact was recognized in *Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 855, 861:

> ". . . the district court's finding here that the overwhelming majority of the parents eligible for the tuition deduction send their children to sectarian schools denies the tuition deduction the protection of *Walz*, and places it, as the district court found, within the proscription of *Nyquist*."

Another fact is obvious. The deduction works to remove from the public treasury monies which otherwise could and should go to public education, while at the same time enhancing the financial status of private and church schools. This bodes down grading or disaster for the free public school system, its aims and purposes, in two main respects.

First, the financial plight of the public schools is a matter of general knowledge. We have seen instances where local boards literally have run out of money, forcing the closing of schools. Every year the battles over local school budgets make newspaper headlines. Thus, it makes no financial sense to remove through tax credits or deductions further monies from the public treasury which otherwise could be used to help the financial distress of the public schools.

Second, it is also obvious that the tuition tax credit or deduction becomes useful only to those citizens who have sufficient gross income to pay income taxes. Thus, the middle and upper classes alone benefit. The inevitable result is an exodus from public schools of the children of those classes and their enrollment in private and church schools. Such class and, presumably, racial segregation, is directly contrary to the cornerstone principles of the free public school system as Justices Brennan and Frankfurter detailed, *supra*.

Furthermore, the New York and Holland experiences referred to above show that government aid causes not merely the attractiveness of attendance at *existing* private

and church schools but results in a proliferation of church schools. Also, since state and federal grants to public school boards are computed upon attendance, such an exodus means even less monies for public education. The credit or deduction thus becomes a two-bladed sword slashing at the very financial well-being of the public school system.

Nothing could better illustrate the evils of this type of indirect aid to private church schools than the history of the Minnesota statute itself. What was once a modest tax deduction has been increased about 150%. This brings to mind what this Court said in *Nyquist* at page 797:

> "But we know from long experience with both Federal and State Governments that aid programs of *any* kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases." (Emphasis added)

This Court should bring to a halt the continual sectarian clamor for *public* funds and under whatever guise. The wit of man cannot mask the illegality. Such church pressure is contrary to our basic principles of separation of church and state as applied to public schools, all as established in a long line of cases, and as Justices Brennan and Franfurter and many others noted.

There can be no doubt, as held in *Nyquist*, that the purpose of this clamor is religious. The prime purpose of a church school is to foster its particular faith and to indoctrinate its particular dogma on the attending children. "Give me a child till he is five and I'll have him for life." Some churches reject the American ideal of religious freedom for all creeds and struggle to make their religion compulsory as the only "true" one, and for that reason conduct their own separate schools. This becomes even more dangerous as such religions have invaded the socio-politico-judicial sphere, *e.g.*, the Roman

Catholic pressures of their dogmas against abortion and divorce, among other things, and the attempt to lobby the federal courts by sending briefs to all their law clerks on the very subject of this case, and in advance of litigation. This alone demonstrates the wisdom of the "entanglement" prohibition.

Furthermore, a school under religious control segregates its children along sectarian lines, as opposed to the public school which is an American melting pot for a unified and enlightened citizenry. Some church school texts and teachers even inveigh against other faiths, forbidding their children to join other organizations and who, under church dogma, are bound to shun other groups. In a public school, the citizens themselves at local levels control curricula and inculcate American principles, including liberty and equality.

Finally, even though in the courts below the Minnesota tuition tax deduction guise may have been upheld in the past, still its dramatic new increases leading to this litigation makes even more pertinent the words of the Court in *Walz* v. *Tax Commission*, 397 U.S. 664, at 678:

> "But historical acceptance without more would not alone have sufficed, as 'no one acquires a vested or protected right in violation of the Constitution by long use."

CONCLUSION

Based upon the holdings of *Nyquist* and for all the reasons foregoing, the Minnesota tax deduction violated the Establishment Clause of the First Amendment. It would cripple our free American public school system, which must be supported and preserved.

Respectfully submitted,

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Dated: December 3, 1982

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